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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM W. HAMILTON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

G. ROBERT GAGE, JR.
GAGE & PAVLIS
120 West 45th Street
New York, New York 10036
(212) 768-4900

Attorneys for Petitioner

167146

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

491P

QUESTIONS PRESENTED

1. Whether a defendant may be convicted of embezzlement under 29 U.S.C. § 501(c) when he has a good faith belief that political contributions which he recommended were authorized by the appropriate union officials and benefitted the union, a matter on which the Seventh and Second Circuits are in conflict?

2. Whether a defendant may be convicted under the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, for defrauding a union where he recommended political contributions in the good faith belief that they had been authorized by the appropriate union officials and that the contributions advanced the political goals of the union?

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Petitioner William W. Hamilton, Jr. respectfully petitions for a writ certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 22, 2001.

OPINION BELOW

The unreported decision of the United States Court of Appeals for the Second Circuit, dated January 22, 2001, is reprinted at PA-1a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 22, 2001. On February 20, 2001, the court of appeals denied Mr. Hamilton's petition for rehearing. (PA-20a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 29 U.S.C. § 501(c) and 18 U.S.C. §§ 1341 and 1343.

29 U.S.C. § 501(c) provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, properties, property or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

This petition arises from the Second Circuit's rejection of the good faith defense to the embezzlement, mail fraud and wire fraud statutes in connection with political contributions. William Hamilton was the Director of Government Affairs for the International Brotherhood of Teamsters ("IBT") from January 1995 to July 1997. In that capacity, he could recommend political contributions. Any contribution he recommended over $500 had to be approved by three IBT officers: the president, the secretary-treasurer and the general counsel. (A. 7-8).

The IBT was active in making contributions to national political candidates in 1996. In 1991, the union's president

had initiated an aggressive program of political giving as a means to increase the IBT's impact on national legislative and governmental issues affecting its membership. This program became even more important in 1994 with a shift of control in Congress which the IBT viewed as unfavorable to its members' interests. In fact, political contributions became a centerpiece of the IBT's national political strategy. (A. 3-4). At the IBT convention in 1996, the delegates voted overwhelmingly to make a maximum effort to use IBT resources in the 1996 national election to replace the current Congress with one more responsive to the needs of its members. As a result of these factors the IBT made unprecedented political contributions in the 1996 national election cycle. The IBT was not alone. The 1996 national election shattered all then existing records for money raised in a national election.

As part of the IBT effort, Hamilton recommended contributions to three Get-Out-the-Vote groups: Citizen Action, Project Vote and National Council for Senior Citizens as well as the AFL-CIO's political action fund. These soft money contributions (i.e., contributions to issue advocacy and get-out-the-vote organizations sympathetic to the political goals of the donor) were a major component of political giving in the 1996 election. (A. 12-17).

The government contended that these contributions were part of a quid pro quo scheme to raise money for Ronald Carey's campaign to be re-elected president of the IBT. The IBT election was held in December 1996. The government contended that certain individuals, not including Hamilton, found wealthy persons who were willing to contribute to the Carey campaign in exchange for the IBT making contributions to issue advocacy groups. The individuals who created the scheme pleaded guilty.

These individuals knew the wealthy donors and the amounts they would be contributing to the Carey campaign. Hamilton did not. These individuals and/or the organizations they were affiliated with made money from the scheme. There is no allegation that Hamilton made any money or feathered his nest in any way from the scheme. The most that could be said about the government's proof regarding Hamilton's state of mind is that he knew that donations would be made to the Carey campaign by donors associated with the advocacy groups to which the IBT contributed.

In accord with settled case law, Hamilton sought to present to the jury his good faith belief that the political contributions he recommended nonetheless benefitted the IBT and were expressly authorized by the required IBT officials. The evidence established that the contributions to Citizen Action, Project Vote, the NCSC, and the AFL-CIO benefitted the objectives of the IBT, supporting Hamilton's defense that he had a good faith belief in this regard. The defense introduced overwhelming evidence to establish that the contributions directly furthered the IBT's political objectives. (*See, e.g.*, A. 172-76; 180-85; 194-95; Tr. 1443).

The defense also presented evidence that Hamilton exercised his discretion and did not cooperate with his purported co-conspirators unless the contributions provided a discernible benefit to the IBT. Thus, Hamilton refused to recommend a $500,000 contribution to the Democratic Senate Campaign Committee ("DSCC") requested by the architects of the scheme because the DSCC worked against the interests of the IBT. (Tr. 354-55). Hamilton likewise declined to recommend an additional contribution to Citizen

Action after he had already recommended significant contributions to the organization. (Tr. 336; 1336; A. 611).[1]

To dispute the defense's benefit theory, the Government argued that the contributions caused financial harm to the union, given the IBT's financial condition in 1996. (*See, e.g.*, A. 217-18). The Government introduced testimony concerning the IBT's finances. (*See, e.g.*, 1763-65; 1028-29). The Government also elicited testimony from a union accountant that he told Hamilton it would not be "prudent" to make contributions out of the General Treasury.[2]

The Government's arguments notwithstanding, the district court found that there was overwhelming evidence in the record to support the defense's theory. (A. 219; 414-15). The trial judge believed there was so much evidence of benefit in the record that if the defense was allowed, the case could not go to the jury. (A. 411-12; 414-16). Nonetheless, whether Hamilton had a good faith belief regarding benefit to and authorization by the union were questions that were never presented to the jury. The trial

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1. Hamilton also introduced substantial evidence concerning the IBT procedures for authorizing contributions, as well as the implementation of such procedures in this case. (*See, e.g.*, A. 204-212.1). The defense offered evidence that each of the disputed contributions had been approved by union authorities in accordance with IBT protocol. (*See, e.g.*, A. 197-208; 212-14).

2. An accountant, Joseph Selsavage, testified that his assessment regarding the propriety of making contributions from the General Treasury was overruled by his superior, the union's secretary-treasurer, who approved the contributions and informed Selsavage the contributions were in "the best interest of the membership." (Tr. 1920).

court declined to give jury instructions requested by both the defense and the government relating to these defenses. It also gave instructions which effectively removed the defenses from the jury's consideration.

Trial began on October 18, 1999, and ended on November 19, 1999, when the jury found Hamilton guilty of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; embezzlement of union funds, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 1341; mail fraud, in violation of 18 U.S.C. §§ 1343, 1346; wire fraud, in violation of 18 U.S.C. §§ 1343, 1346; false statements in a matter within the judicial or executive branches of government, in violation of 18 U.S.C. § 1001; and perjury in front of the grand jury, in violation of 18 U.S.C. § 1623. The false statement and perjury counts were based on Hamilton's denial of his involvement in the scheme. On March 14, 2000, Hamilton was sentenced to concurrent terms of 36 months of imprisonment, followed by two years supervised release on each count to be served concurrently. (A. 2).

REASONS FOR GRANTING THE WRIT

Until the decision in *United States v. Hamilton* it was clearly understood that a defendant who had a good faith belief that political contributions which were made for a union's benefit and which were authorized by the union did not possess fraudulent intent. *United States v. Vandenbergen*, 969 F.2d 338 (7th Cir. 1992). The Second Circuit had previously characterized such a good faith belief as an "absolute defense" to embezzlement charges. *See United States v. Nolan*, 136 F.3d 265 (2d Cir. 1998), *cert. denied sub nom., Mezzetta v. United States*, 524 U.S. 920 (1998).

Hamilton has changed this. Now, presumably, if a defendant "knowingly participates" in a scheme which a trial court determines is illegal — even if the political contributions in question benefit the union and have been authorized by it — he is guilty of embezzlement, mail fraud and wire fraud. The result of this holding is to: (1) redefine the elements of embezzlement, mail fraud and wire fraud; (2) take from the jury the factual determination of whether a defendant acted with specific intent to deprive a union of the use of its funds; and (3) strip defendants of the good faith defense.

Hamilton does not address the difficult issues raised by its result. Rather the summary opinion avoids any meaningful explanation of the newly created standard. This approach is troublesome. *Hamilton* was a highly visible, closely watched trial. Hamilton's rejection of the good faith defense was widely followed and is well known. The result is that there is confusion and uncertainty about the applicability of the good faith defense in connection with three of the most commonly charged federal criminal statutes.

There is also a split between the Seventh Circuit, *United States v. Vandenbergen*, *supra*, and the Second Circuit, *Hamilton*, *supra*, on the proper application of the good faith defense. *Hamilton* expressly rejected the holding of *Vandenbergen*. The fair and effective administration of justice will be importantly served by the Court's clarification of this issue.

Guidance from the Court is also critical because this case involved political contributions. Virtually all political contributions have multiple purposes. A donor often seeks to advance not only the candidate or cause to which he contributes but also his own agenda. Moreover, different persons in the

same organization may have different motives for recommending or supporting a political contribution. These are the realities of political giving. As a consequence, juries have *not* been instructed in embezzlement and mail and wire fraud cases to determine "the reason" for a contribution in deciding a defendant's fraudulent intent. Rather, juries have been instructed to determine if the defendant had a good faith belief that the contribution was authorized by the union and for the benefit of the union.

In sharp contrast, the *Hamilton* decision essentially assumes there is a single reason for a political contribution and requires the jury to determine that reason as well as a defendant's "hope" in recommending the contribution. This standard is doubly flawed: it ignores the reality of our political system and it is dangerously ambiguous, especially for application in a criminal case.

We respectfully submit that the Court's intervention is essential to bring clarity to the determination of fraudulent intent, and the proper application of the good faith defense in embezzlement, mail fraud and wire fraud cases.

I.

A GOOD FAITH BELIEF THAT POLITICAL CONTRIBUTIONS WERE AUTHORIZED BY AND BENEFITTED A UNION IS A DEFENSE TO EMBEZZLEMENT

The good faith defense has long been central to the defense of embezzlement charges. As the Second Circuit itself made clear in *United States v. Nolan*, *supra*, the good

faith concepts of authorization and benefit should be used by the jury to determine *whether* a defendant acted with specific criminal intent to deprive the union of the use of its funds. *Id.* at 270. To that end, the Second Circuit approved the following charge in *Nolan*:

> *In making a determination of whether a defendant acted with specific intent* to deprive the Plan or a fund connected therewith of the use of its funds, *you may consider the following*: (1) whether or not the alleged use of the funds of the Plan was authorized and whether or not that defendant had a good faith belief that such use was authorized or would be authorized; and (2) *whether or not that defendant had a good faith belief that such use of the funds of the Plan benefitted the participants and beneficiaries of the Plan.*

Id. (emphasis added).

For over three decades, this has been the law of the Second Circuit, (*see United States v. Nolan*, 136 F.3d 265, 270 (2d Cir. 1998), *cert. denied sub nom., Mezzetta v. United States*, 524 U.S. 920 (1998); *United States v. Butler*, 954 F.2d 114, 118 (2d Cir. 1992); *United States v. Ottley*, 509 F.2d 667, 671 (2d Cir. 1975); *United States v. Silverman*, 430 F.2d 106, 127 (2d Cir. 1970)), and other circuits, *United States v. Vandenbergen*, 969 F.2d 338 (7th Cir. 1992).

In accordance with this settled case law, defense counsel in *Hamilton* specifically requested that the jury charge incorporate the established defenses of authorization, benefit, and good faith. (A. 102-32; 141-44; 159). Even the Government submitted proposed jury instructions modeled

exactly after the holding in *Nolan, supra*. Specifically, the Government requested the following charge:

> Good faith is an absolute defense to this charge. Accordingly, the Government must prove that: (1) the defendant did not believe in good faith that the use of the IBT's funds, as charged in the Indictment, benefitted or would benefit the union; *or* that (2) the defendant did not believe in good faith that the use of the IBT's funds could properly be authorized by the union if they knew the relevant facts. (A. 636).

When the district court refused to incorporate the *Nolan* standard into its charge, the Government urged the district court on no less than five occasions to reconsider its erroneous position. (Tr. 2988-93; A. 408-13).

Despite extensive presentation by both sides on the theories of authorization and benefit, and the district court's acknowledgment of how such evidence weighed dispositively in favor of the defense, the district court eliminated all references to the defense theories of benefit and authorization in the jury charge. Instead, the district court charged the jury:

> I instruct you that if the defendant recommended the contributions to Citizen Action, Project Vote, the NCSC and the AFL-CIO for the purpose of having money contributed to the Ron Carey campaign in exchange for the contributions to those organizations, and if he knew about such an exchange scheme and intended that it be carried out, then he was guilty of the crime of embezzlement charged in Count 2.
>
> *This is true even if the defendant believed that the political goals of the organizations promoted the*

> *political objectives of the IBT and even if the defendant believed that the funds would be used in ways consistent with the . . . political goals of the IBT.*

(A. 352) (emphasis added).

* * *

> I am instructing you that as a matter of law, the IBT could not lawfully decide to contribute money to an organization, even one with sympathetic political goals and activities for the purpose of effectuating an exchange scheme in which money would be contributed to the Ron Carey campaign.

(A. 353-54). The district court repeated each of these instructions twice — for the sake of emphasis. Despite the heavy weight of authority to the contrary, the Second Circuit affirmed the district court. In doing so, the Second Circuit created a legal standard contrary to previously well-established law.

Authorization from and benefit to the union are clearly established good faith defenses to the charge of embezzlement under section 501(c). *See United States v. Nolan*, 136 F.3d at 270 (holding good faith is an "absolute defense" to the charge of embezzlement under section 501(c)); *United States v. Silverman*, 430 F.2d at 127 ("it is doubtful whether a payment made in a bona fide belief that it was for a union's benefit and that it had been authorized or would be ratified can ever be swept under 29 U.S.C. § 501(c)"); *United States v. Dixon*, 609 F.2d 827, 829

(5th Cir. 1980) ("a good faith belief in union benefit constitutes a defense unless the Government can show the defendant knew that the funds were unauthorized"); *United States v. Defries*, 129 F.3d 1293, 1306 (D.C. Cir. 1997) (holding that a violation of section 501(c) requires the unauthorized appropriation of property); *United States v. Todd*, 108 F.3d 1329, 1334 (11th Cir. 1997) (holding that district court erred in excluding testimony of employee benefits and potential authorization relevant to establish a defense); *United States v. Vandenbergen*, *supra*, (reversing conviction under section 501(c) where disputed political contributions were authorized); *United States v. Cottrell*, No. 85-00024, 1986 WL 11439, (E.D. Pa. Oct. 9, 1986) at *5 ("[t]here can be no question that good faith constitutes a defense to alleged violation of section 501(c)").

Indeed, "[a]uthorization from and benefit to the union are the controlling lodestars to determine whether a defendant acted with the fraudulent intent to deprive the union of its money." *United States v. Butler*, 954 F.2d at 118; *United States v. Mett*, 178 F.3d 1058, 1068 (9th Cir. 1999) ("We do not disturb the general rule: in both the pension fund and union fund contexts, facts pertaining to authorization and benefit (whether to plan participants or the union) may be relevant to the question of intent"); *United States v. Todd* 108 F.3d 1329, 1334 (11th Cir. 1997) (holding that district court erred in excluding testimony of employees benefits and potential authorization, evidence going directly to the question of defendant's criminal intent); *United States v. Carlino*, 143 F.3d 340, 344 (7th Cir. 1998) ("The lack of authorization to expend the funds for the particular expenses is a circumstance indicative of fraudulent intent . . . Another factor establishing fraudulent intent is the lack of good faith belief that the expenditure would benefit the union").

The authorization and benefit defenses go to the very question of whether a defendant had the requisite intent to commit the crime of embezzlement, a question indisputably to be resolved by a jury. *See United States v. Ottley*, 509 F.2d 667 (2d Cir. 1975). *See also Morissette v. United States*, 342 U.S. 246, 274, 72 S. Ct. 240, 255 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury").

By affirming the failure to charge the good faith defense, the Second Circuit precluded the jury from properly considering Hamilton's criminal intent. This Court's intervention is essential to resolve the conflict and ambiguity on this crucial issue.

II.

THERE IS A CONFLICT BETWEEN THE SECOND CIRCUIT AND THE SEVENTH CIRCUIT ON THE GOOD FAITH DEFENSE

The Second Circuit's decision in *Hamilton*, *supra*, conflicts with the Seventh Circuit's decision in *Vandenbergen*, *supra*. The facts in *Vandenbergen* illustrate that benefit and authorization are the essence of a good faith defense to embezzlement. Vandenbergen was the secretary-treasurer of a local union in Appleton, Wisconsin. The local supported the Democratic candidate for mayor because, *inter alia*, her opponent had led the city council in rejecting contracts between the city and some of its union workers. *Id.* at 338. Wisconsin election laws, however, limited giving by unions to political candidates.

Vandenbergen devised a scheme to defeat the state election laws by "bonusing" seven members of his executive committee $300 apiece and then requiring each one of them to make a $300 contribution to the Democratic candidate. Vandenbergen personally collected these checks and delivered them to the democratic candidate. The democratic candidate was elected. Vandenbergen was convicted. The district court later observed that the testimony Vandenbergen gave at trial to explain his conduct "was shot through with lies, amounting to the obstruction of justice." *Id.* at 339.

The Seventh Circuit nonetheless reversed Vandenbergen's conviction for embezzlement. The Court, in language highlighting the error of *Hamilton*, held:

> It is essential to distinguish the mental element of § 501(c) from the forbidden acts — embezzlement, theft and conversion. This list does not include all violations of other laws but only the three named sins, which collectively denote acts that enrich the officers (or their friends) at the expense of the union. "The common thread is that the defendant . . . has taken another person's property or caused it to be taken, knowing that the other person would not have wanted that to be done." *United States v. Silverman*, 430 F.2d 106, 126-27 (2d Cir. 1970) (Friendly, J.).

Id. at 339. It is noteworthy that the Seventh Circuit relied on Judge Friendly's opinion for the Second Circuit in *Silverman* which *Hamilton* has effectively overruled.

The Seventh Circuit found that the record before it did "not support a conclusion that Vandenbergen and friends

feathered their own nests to the detriment of the union." *Id.* at 339. "To the contrary," the Court reasoned, it "shows that the executive board did what it thought necessary to promote the re-election of a mayor considerably more supportive to labor's interests than her opponent." *Id.* at 339. The Court reasoned:

> Once the city council rejected the contracts, the union was entitled to arbitrate. Vandenbergen estimated (without contradiction) that arbitration would have cost the union at least $24,000 — and it might have lost. With [the democratic candidate having been elected] Mayor, the union achieved its ends without that cost, and there would be other contracts to negotiate during her term. The union and its members were better off. They "would have wanted that to be done" — the benefit to union of making political contributions is precisely why Wisconsin made them unlawful.

Id. at 339-40.

Thus, the Seventh Circuit concluded that the Federal crime of embezzlement, 29 U.S.C. § 501(c), does not exist where the political contributions benefit the union and have been authorized by it — even if the contributions are made in the context of an improper scheme. Indeed, the Seventh Circuit found that evidence of a benefit to the union from the use of the funds, may, in certain circumstances, supersede any purported illegality from defendant's use of union money. In *Hamilton*, the district court prevented the jury from considering issue of "the benefit to the union of making political contributions". The Second Circuit's approval of this decision eliminated the good faith defense from political contribution cases. We respectfully submit that a decision is

needed by this Court to resolve the conflict between the law of the Seventh Circuit and what has now become the law of the Second Circuit.

III.

A GOOD FAITH BELIEF THAT POLITICAL CONTRIBUTIONS WERE AUTHORIZED BY AND BENEFITTED A UNION IS A DEFENSE TO MAIL AND WIRE FRAUD

The District Court's instructions on the mail and wire fraud charges likewise omitted reference to the defendant's good faith belief regarding benefit and authorization. Hamilton's good faith defense in the mail and wire fraud context was anchored to the concepts of benefit and authorization. The benefit theory was particularly probative on the issue of Hamilton's intent to commit mail and wire fraud.

Evidence was introduced at trial that Hamilton used his discretion to deny proposed contributions to organizations opposed to the union's objectives, and overwhelming evidence was introduced to show the disputed contributions were made to organizations actively pursuing the same political objectives as the IBT. This evidence bore directly on the factual question of whether Hamilton was a knowing participant in the swap, and whether he actively intended to deceive and harm the union. Nonetheless, the jury was prohibited from considering how these factors weighed on the dispositive issue of Hamilton's specific intent. Thus, the jury was deprived of the "controlling lodestars" essential to

guiding the course of its deliberation on the critical issue of Hamilton's intent to harm.[3]

The trial judge told the jury that it must find that Hamilton "concealed the true nature of what was being done in order to deceive persons involved in the approval process with the specific intent of having the money paid out from the treasury of the IBT as a result of that concealment." (A. 362-63). This instruction "posed a genuine risk of confusing the jury into believing that it would be proper to convict Hamilton of the fraud counts "without finding that he contemplated harm" to the IBT. *United States v. Rossomando*, 144 F.3d 197, 200 (2d Cir. 1998). This is particularly the case because Hamilton's good faith defense was anchored to the concept of benefit to and authorization of the IBT, which the trial judge removed from the jury's consideration. As the defense and the government urged, the law provides that the government must prove the defendant did not believe in good faith that the use of the IBT's funds as charged in the indictment benefitted or would benefit the union. (A. 412-14).[4]

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3. The essential elements of a mail fraud violation are: (1) a scheme to defraud; (2) money or property; and (3) the use of the mails to further the scheme. *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir. 1991). "Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. . . . the deceit *must* be coupled with a contemplated harm to the victim." *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (emphasis added). The government "must, at a minimum, prove that defendants contemplated some actual harm or injury to their victims." *Id.*

4. The reversal of the embezzlement and mail and wire fraud charges also require dismissal of the remaining counts. Count 1, the

(Cont'd)

Shorn of the required instructions on the defendant's good faith belief on benefit and authorization, the court's charge on "good faith" and "intent to harm" under the mail and wire fraud statutes was distorted and devoid of context, precluding the jury from properly considering Hamilton's intent. As a result, the mail and wire fraud charges were likewise a significant departure from well established law. "Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution . . . the deceit must be coupled with a contemplated harm to the victim." *United States v. Starr*, 816 F.2d at 98. ("Only a showing of the intended harm will satisfy the element of fraudulent intent.")[5]

In effect, the Second Circuit has eviscerated the good faith defense to the mail and wire fraud statutes. We respectfully submit that this Court should address, and correct, this serious error and the substantial confusion which it has created.

(Cont'd)
conspiracy, was based on the embezzlement and mail and wire fraud charges. Similarly, the government's argument regarding the false statement and perjury counts, i.e. that Hamilton was lying to cover up crimes, was "inextricably intertwined" with the embezzlement and mail and wire fraud counts.

5. As with the embezzlement charges, the Second Circuit's affirmance of the district court's jury instructions has changed the law in this Circuit, again creating conflict between circuits. *Compare Hamilton* with *United States v. Richards*, 204 F.3d 177, 207 (5th Cir. 2000); *United States v. Whitehead*, 176 F.3d 1030, 1039 (8th Cir. 1999); *United States v. St. Gelais*, 952 F.2d 90, 95 (5th Cir. 1992).

CONCLUSION

For the reasons set forth herein, Mr. Hamilton's writ of certiorari should be granted.

Respectfully submitted,

G. ROBERT GAGE, JR.
GAGE & PAVLIS
120 West 45th Street
New York, New York 10036
(212) 768-4900

Attorneys for Petitioner

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JANUARY 22, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of January, two thousand and one.

PRESENT:

HON. ROBERT D. SACK,
HON. SONIA SOTOMAYOR,
HON. ROBERT A. KATZMANN,

Circuit Judges.

No. 00-1228
No. 00-1318

UNITED STATES OF AMERICA,

Appellee-cross-Appellant,

– v –

Appendix A

WILLIAM W. HAMILTON, JR.,

Defendant-Appellant-
cross-Appellee.

* * *

Appeal from the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be, and it hereby is, **AFFIRMED**.

Hamilton appeals from a judgment of conviction entered on April 11, 2000, following a five week jury trial in the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*). Hamilton, who was at all relevant times the Director of Governmental Affairs for the International Brotherhood of Teamsters (IBT), was convicted on all counts of a six count indictment charging conspiracy, embezzlement of union funds, mail fraud, wire fraud, making false statements to a court appointed election officer, and perjury.

The rules governing the 1996 IBT election prohibited the direct or indirect use of IBT funds to promote the candidacy of anyone running for union office and prohibited contributions by employers or management to candidates for union office. Federal labor law also prohibits the use of union funds or employer contributions to promote the candidacy

of anyone running for union office. *See* 29 U.S.C. § 481(g). Hamilton was accused of circumventing those provisions by participating in a "swap scheme" under which wealthy persons who wished to channel money to political causes would donate the money to the 1996 reelection campaign of incumbent IBT President Ron Carey instead, in exchange for which IBT funds would be given to the donor's chosen political causes. The effect of the alleged scheme was to finance the Carey reelection campaign with union money. Hamilton was charged with, *inter alia*, aiding and abetting a violation of 29 U.S.C. § 501(c), which makes it a crime for "[a]ny person [to] embezzle[ ], steal[ ], or unlawfully and willfully abstract[ ] or convert[ ] to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly," and for mail fraud and wire fraud under 18 U.S.C. §§ 1341 and 1343, respectively. Hamilton was also charged with making false statements under 18 U.S.C. § 1001 and perjury under 18 U.S.C. § 1623 in connection with the investigation of the scheme.

Hamilton asserts several grounds for reversal.

He first challenges the district court's jury instruction on the embezzlement, mail fraud, and wire fraud charges. The propriety of jury instructions is a question of law that we review de novo. *See United States v. Naiman*, 211 F.3d 40, 50 (2d Cir. 2000). "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999) (citation and quotation

marks omitted). However, "[r]eversal is required only if the instructions, viewed as a whole, caused the defendant prejudice." *Naiman*, 211 F.3d at 51. "Where the defendant requests a charge as to his defense of good faith, there is no basis for reversal where the court's instructions have properly explained the thrust of that defense." *United States v. Paccione*, 949 F.2d 1183, 1200-01 (2d Cir. 1991).

Central to a conviction for embezzlement under § 501(c) is proof of fraudulent intent. Our case law establishes that "a union official charged with embezzling union funds, pursuant to 29 U.S.C. § 501(c), lacks the requisite criminal intent when the evidence establishes that he had a good-faith belief *both* that the funds were expended for the union's benefit *and* that the expenditures were authorized (or would be ratified) by the union." *United States v. Butler*, 954 F.2d 114, 118 (2d Cir. 1992) (emphasis added). "Authorization from and benefit to the union are the controlling lodestars to determine whether a defendant acted with the fraudulent intent to deprive the union of its money." *Id.* Proof of a good faith belief that expenditure of the funds benefitted the union, without proof of a good faith belief that the expenditure was or would be authorized — and vice versa — is insufficient to make out the "good faith" defense. Likewise, authorization without a good faith belief that the use of the funds benefitted the union is insufficient.

Hamilton requested that the jury be charged on a good faith defense of authorization and benefit. The district court refused to include the standard authorization and benefit language, *see United States v. Nolan*, 136 F.3d 265, 270 (2d Cir. 1998), believing that the standard charge would lead

the jury to infer, erroneously, that their findings on the issues of whether Hamilton and the union officials who authorized the contributions were aware of the quid pro quo scheme was irrelevant to their finding on the embezzlement charge.

Addressing the court's concern, the government proffered a version of the standard benefit and authorization charge tailored to the facts of this case. The district court declined to use it. Instead, the court charged that if Hamilton was aware of the quid pro quo scheme and intended that it be carried out, the jury should find him guilty on the embezzlement charge.

While we think that it may well have been better for the district court to have used the government's version of the benefit and authorization charge, we conclude that the charge that the district court in fact employed was correct under the circumstances of this case. The swap scheme alleged in the indictment was an illegal means of attaining an illegal end: use of union funds for the Carey election campaign. That was true even if the swapped union fund contributions that made up part of the scheme were consistent with IBT goals, and even if the contributions were authorized by the union, at least if the authorization was made without knowledge that the contributions were part of a swap for money paid for the Carey campaign. "An authorization obtained without disclosure of . . . material information is obviously a nullity." *Butler*, 954 F.2d at 119. So long as Hamilton knowingly participated in the illegal scheme of swapping contributions to Carey for contributions to political organizations, rather than a plan to have IBT give the money in the hope that it would attract contributions to the Carey campaign, as the instructions pointed out, Hamilton had no good-faith defense.

The district court also properly charged the jury on the good faith defense to mail fraud and wire fraud. Our focus in reviewing mail and wire fraud jury instructions has been to ensure that the jury is instructed that a specific finding of intent to harm is necessary for conviction. *See United States v. Koh*, 199 F.3d 632, 641 (2d Cir. 1999). The court properly instructed the jury that it must find that Hamilton made misrepresentations with the specific aim of harming the IBT by depriving it of money in order to convict him of mail and wire fraud. The court further charged that "a good faith belief in the honesty of the representations is a complete defense. . . . The government has the burden of proof to show the intent to deceive instead — and that that occurred rather than a good faith belief, an honest belief in the truth of the representations." We have held that a court properly charged the jury on the good faith defense to mail and wire fraud when it instructed that "[a]n honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statement may turn out to be. No further elaboration was necessary." *United States v. Alkins*, 925 F.2d 541, 550 (2d Cir. 1991) (internal quotation marks omitted). The district court did not commit error by its charge on these counts.

Hamilton next argues that the district court erred in permitting Carey's campaign manager to testify about a scheme to defraud the IBT with which Hamilton had no connection. We review evidentiary rulings for abuse of discretion. *See Naiman*, 211 F.3d at 51; *United States v. Diaz*, 176 F.3d 52, 79 (2d Cir.) (cert. denied sub nom *Rivera v. United States*, 528 U.S. 875 (1999).

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At the beginning of his testimony, Jere Nash, Carey's campaign manager, described an earlier scheme in which he and others planned to obtain contributions totaling $150,000 from three union leaders by disguising the contributions as coming from individual union members who were not limited by the rules. Nash pleaded guilty to his involvement in this scheme as part of his cooperation agreement with the government. Hamilton's counsel objected to the testimony after it had concluded.

The district judge did not abuse his discretion in permitting this testimony. We have held that "[t]he trial court may admit evidence that does not directly establish an element of the offense charged, in order to provide background for the events involved in the case." *United States v. Skowronski*, 968 F.2d 242, 246 (2d Cir. 1992). Additionally, since Nash was a participant in the previous scheme and was a testifying witness, "it was appropriate for the prosecution to elicit testimony during direct examination that exposed details damaging to . . . [his] credibility." *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991). The prosecution is allowed to elicit such testimony in order "to avoid the appearance that it was concealing impeachment evidence from the jury." *Id.* It was not the type of testimony that would prejudice the defendant. Indeed, if anything, the testimony seems to support Hamilton's theory that he was never part of a conspiracy or plan. Even if there was any error, it was harmless.

Finally, Hamilton challenges the sufficiency of the evidence for his perjury conviction (Count Six) on the grounds that two of the twenty-eight specifications were

literally true and colored the entire conviction because the jury returned a general verdict of guilty. The evidence was sufficient to support Hamilton's conviction.

A defendant seeking to overturn a conviction based on the insufficiency of evidence "bears a heavy burden." *United States v. DeSimone*, 119 F.3d 217, 223 (2d Cir. 1997) (citations omitted). We consider the evidence in the light most favorable to the government, drawing all inferences in its favor. *See United States v. Aulicino*, 44 F.3d 1102, 1114 (2d Cir. 1995). We will sustain a jury's verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted).

Perjury requires a jury to determine whether the witness believes that a statement he made is true or false. "Absent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of [declarant's] answer [is] for the jury." *United States v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1986) (internal quotation marks and citations omitted) (alterations in original). Whether an answer is literally true is also a factual question for the jury. *See id.* at 373; *see also United States v. Schafrick*, 871 F.2d 300, 304 (2d Cir. 1989).

The "literally true" defense, or the "Bronston Defense," does not provide the defendant relief in this case. *See Bronston v. United States*, 409 U.S. 352 (1973). "The purpose of the Bronston rule is to place the burden on the examiner to probe for details during the examination. The rule prevents an examiner from resolving ambiguities in the elicited testimony with a perjury prosecution after the fact." *Schafrick*, 871 F.2d

at 303. This Circuit, however, examines not only "the literal truth or falsity of defendant's words, but also . . . the context in which these words were spoken." *Id.* at 303-04. "If, in the context in which the statements were made, they were materially untrue, then perjury is established. This is so even if the statements could be literally true in isolation." *Id.* at 304. The statements that Hamilton claims are literally true are only literally true in isolation. A reasonable jury could have found beyond a reasonable doubt that these statements were materially untrue in the context of the questions asked of Hamilton. The perjury conviction must therefore stand.

The judgment of the district court is therefore hereby AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

s/ Lucille Carr 1/22/01
By: Date

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED APRIL 10, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: 98 Cr. 00393-001(TPG)

UNITED STATES OF AMERICA

V.

WILLIAM W. HAMILTON, JR.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

G. Robert Gage, Jr.
Defendant's Attorney

THE DEFENDANT:

* * *

X was found guilty on count(s) 1, 2, 3, 4, 5 & 6 after a plea of not guilty.

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Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 USC 371	Conspiracy to embezzle union funds, commit mail and wire fraud, and to make false statements. Class D Felony	6-30-97	1
29 USC 501(c)	Embezzlement of union funds. A Class D Felony	6-30-97	2
18 USC 1341	Mail Fraud. A Class D Felony	11-30-96	3
18 USC 1341	Wire fraud. A Class D Felony	11-30-96	4
18 USC 1001	Making false statements. A Class D Felony	6-30-97	5
18 USC 1623	Perjury. A Class D Felony	4-30-97	6

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

Appendix B

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 450-66-6596	3-14-00 Date of Imposition of Judgment
Defendant's Date of Birth: 8-27-42	
Defendant's USM No.: 38492-054	s/ Thomas P. Griesa Signature of Judicial Officer
Defendant's Residence Address: 206 Hollow Lane Woodstock, VA 22664	Thomas P. Griesa, United States District Judge Name & Title of Judicial Officer
Defendant's Mailing Address: same as above	4-10-00 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of THIRTY-SIX (36) MONTHS on each of counts 1, 2, 3, 4, 5 & 6 to be served concurrently.

* * *

Appendix B

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS.

The above term of supervised release is imposed on counts 1, 2, 3, 4, 5 & 6 to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that

remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

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7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix B

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Restitution
Totals:	$ 600.00	$ 100,000

* * *

RESTITUTION

* * *

The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

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Name of Payee	*Total Amount of loss	Amount of Restitution Ordered
International Brotherhood of Teamsters c/o Patrick Szymanski General Counsel for Int'l Brotherhood of Teamsters 25 Louisiana Avenue, NW Washington, D.C. 20001	885,000	100,000
Totals:	$885,000	$100,000

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

B x $600.00 immediately, balance due (in accordance with C, D, or E); or

* * *

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

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The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Restitution shall be paid in full on or before conclusion of term of Supervised Release.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

x The court adopts the factual findings and guideline application in the presentence report.

* * *

Appendix B

Guideline Range Determined by the Court:

Total Offense Level: 23

Criminal History Category: 1

Imprisonment Range: 46 to 57 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 10,000 to $ 100,000

x Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 100,000

* * *

x The sentence departs from the guideline range:

* * *

X for the following specific reason(s):

Defendant's community service.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 20, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of February, two thousand one.

Present:

Hon. Robert D. Sack,
Hon. Sonia Sotomayor,
Hon. Robert A. Katzmann,

CIRCUIT JUDGES,

Docket No. 00-1228

USA

Appellee-cross-Appellant,

v

Appendix C

William W. Hamilton

Defendant-Appellant-
cross-Appellee.

A petition for panel rehearing having been filed herein by William W. Hamilton, Jr.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney